In the present appeal, the two tape recorders would surely shed light as to what actually transpired at the JPJ office and at the Court premises. The prosecution failed to explain completely as to why the two tape recorders were not produced bearing in mind that there was evidence that the complainant returned the two tape recorders to the BPR officers. In short, the two tape recorders were in the possession or power of the prosecution and they saw it fit to withhold it. It would not be incorrect to say that the contents of the two tape recorders could, of course, have been of vital importance because had it recorded the entire conversation between the first appellant and the complainant at the JPJ office and between the second appellant and the complainant at the Court premises, it would have been overwhelming corroboration of the complainant's version of the conversation given by both the accused persons.

On the basis of the stand I take in regard to the present appeal, I need not consider the other grounds which are inconsequential in nature. The conviction and sentence of both the appellants should be set aside and I so order, accordingly. The fines, if paid, are to be refunded.

Both the appellants suffered undue torment and mental anguish since 28 July 1987 and, in the circumstances, I do not propose to order a retrial. There will therefore be no order of a retrial.

NOOR JAHAN BT. ABDUL WAHAB

v.

MD. YUSOFF B. AMANSHAH & ANOR.

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[SUIT NO. 22-97-88]
3 JULY 1993

JURISDICTION: Property dispute between Muslim husband and wife - Wife claiming ownership of shares acquired during subsistence of marriage - Claim based on resulting trust - Whether action came within exclusive jurisdiction of the Syariah Court - Penang Administration of Muslim Law Enactment 1959 s. 40(3) - Federal Constitution Art. 121(1A).

LAW OF TRUST: Shares purchased by wife but registered in husband's name - Whether husband holding shares in trust - Whether shares a gift to husband - Whether presumption of resulting trust arose.

INTERPRETATION OF STATUTES: Section 40(3) Penang Administration of Muslim Law Enactment 1959 - Whether section restrictive in nature - Intention of the Legislature - Whether intention was to limit the jurisdiction of the Kathi Court - Long title to Enactment - Whether relevant to interpretation of Enactment.

INJUNCTION: Setting aside - Non-disclosure - Whether non-disclosure so severe as to call for discharge of injunction - Delay - Plaintiff waited for three years before applying for interim injunction - Whether delay sufficient ground for discharge.

The plaintiff claimed against the first defendant, her former husband, for a declaration that the first defendant was holding 47001 units of Amanah Saham shares in her trust, for the return of those shares and for continuation of an interlocutory injunction she had earlier obtained against the first defendant pertaining to the shares. The shares in question were issued by the second defendant, Amanah Saham Nasional Berhad.

It was not disputed that the plaintiff used her own money to purchase the shares but the facts showed that the entire shares had been registered in the name of the first defendant. The contention of the first defendant was that the shares were a birthday gift to him and therefore there was no question of any resulting trust or

any trust at all arising. The first defendant also raised the issue of jurisdiction and averred that the nature of the plaintiff's action were such that by reason of Article 121(1A) of the Federal Constitution read with s. 40(3) of the Penang Administration of Muslim Law Enactment 1959, the action came within the exclusive jurisdiction of the Syariah Court to the exclusion of the Civil Court. In the Court evidence was further led which indicated that the plaintiff was guilty of non-disclosure of certain material facts when applying *ex-parte* for interlocutory injunction and this factor coupled with the delay of almost three years in staking her claim to the shares, according to the first defendant, was fatal to her request to continue the injunction. The first defendant thus applied by way of summons-in-chambers and prayed that the action of the plaintiff be struck out for disclosing no reasonable cause of action and for being frivolous, vexatious and misconceived in law.

Held:

[1] The words of s. 40(3) of the Enactment are restrictive in nature and are reflective of the intention of the legislature to restrict the jurisdiction of the Court of the Kathi only to actions and proceedings of the sort specified thereunder.

[2] In order to bring a particular action within the purview of s. 40(3) of the Enactment, and therefore within the exclusive jurisdiction of the Syariah Court, the action in question must have a direct and immediate connection with the marriage or divorce of the parties and it is not sufficient that the marriage or divorce is merely remotely or incidentally involved with that action.

[3] The plaintiff's action in the present case did not relate to their marriage or divorce and nor did it relate to any claim to property arising out of their marriage or divorce or to any division *inter vivos* of their sepencarian property. The claim is based on the presumption of a resulting trust and has nothing to do with Muslim religious affairs. The action therefore does not come within the exclusive jurisdiction of the Kathi Court within the meaning of s. 40(3) of the Enactment read with Article 121(1A) of the Federal Constitution.

[4] Although s. 75 of the Enactment gives powers to Syariah Court to make interim orders in respect of injunctive relief, the plaintiff's claim for injunctive relief in the instant case is not ancillary to her divorce but merely consequential to the primary relief sought, which is for a declaration as to ownership of the shares.

[5] It is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, especially when, as here, issues of credibility are involved. The appropriate time for assessing the evidence, having regard to the circumstances of this case, is at the trial when there will be full opportunity for cross examination and discovery. Accordingly the prayer to strike out the action is refused.

[6] There is no absolute right in law to have an *ex parte* order obtained without due disclosure set aside although the Court may discharge such an injunction on the sole ground of non-disclosure. The question to be asked is whether the non-disclosure is so severe that, had there been full disclosure, the Court would not have granted the interlocutory injunction. The facts of the present case are such that the Court is not prepared to hold that if the full and true picture had been disclosed, the Court would not have granted the interlocutory injunction.

[7] It is settled law that delay on the part of the plaintiff in seeking an interlocutory injunction may throw considerable doubt on the reality of his alleged injury but much will depend upon the particular circumstances of each case. Having regard to the relationship of the parties concerned, and their particlar circumstances, it is natural that the plaintiff would have been reluctant to sue the first defendant. The delay is not so serious as to result in the discharge of the interlocutory injunction.

[Application dismissed and defendant ordered to file defence].

Cases referred to:

Dyer v. Dyer [1788] 2 Cox at p. 93 ***(refd)***
Lambe v. Director-General of Social Services [1981] 57 FLR 262, 268-269 ***(cit)***
Sage v. Eicholz [1919] 2 KB 171 ***(cit)***
R. v. Peters [1886] 16 QBD 636, 641 ***(refd)***
Hujah Lijah bt. Jamal v. Fatimah bt. Mat Diah [1950] MLJ 63 ***(foll)***
Attorney General Republic of Peru v. Peruvian Guano Co. [1887] 36 Ch. D. 489 ***(cit)***
Wenlock v. Maloney [1965] 1 WLR 1238 ***(cit)***
Dyson v. AG [1911] 1 KB 410 ***(cit)***
Mercier v. Mercier [1903] 2 Ch. 98 ***(cit)***
Pettit v. Pettit [1970] AC 777 at 793 ***(refd)***
Falconer v. Falconer [1970] 1 WLR 1333 ***(refd)***

Dormeuil Freres SA & Anor. v. Nicolian International (Textiles) Ltd. [1988] 3 AER 197 ***(foll)***
Hong Leong Holdings Ltd. v. Sunbird (Pte.) Ltd. [1990] 3 MLJ 65 ***(cit)***
Professor Dr. A Kahar Bador & Ors. v. N. Krishnan & Ors. [1983] 1 MLJ 407 ***(cit)***
Ware v. Regent's Canal Co. ***(cit)***
Coles v. Sims ***(cit)***

Legislation referred to:
Penang Administration of Muslim Law Enactment 1959, ss. 2, 40(1), (3)(b)(i), (ii), (iii), (iv), 75
Federal Constitution, Article 121(1A)
Married Women Ordinance 1957, ss. 3, 4(a)
Rules of the High Court 1980, O. 20

Other sources referred to:
Islamic Law in Malaya, Professor Dr. Ahmad Ibrahim, (1965) p. 288
Law of Trusts and Trustees, Underhill & Hayton 14th Edn., p. 288

For the plaintiff - Mohideen Abdul Kader; M/s. Mohideen & Partner
For the defendant - Noordin bin Hj. Suleiman; M/s. Ghazi & Lim

JUDGMENT

Edgar Joseph Jr. SCJ:
This was an application by way of summons-in-chambers to strike out the writ of summons, the Indorsement and the statement of claim dated 14 July 1988 against the first defendant on the ground that it discloses no reasonable cause of action and/or as being frivolus, vexatious and misconceived in law and an abuse of the process of the Court.

The plaintiff's claim against the first defendant, her former husband, is for a declaration that 47,001 units of Amanah Saham Shares ("the shares") issued by the second defendant Amanah Saham National Bhd. although registered in the name of the first defendant are held in trust for her, for an injunction and for an order for transfer of those shares in her favour.

The plaintiff alleges that during the subsistence of the marriage, she had purchased the shares in the name of the first defendant at the instance of the first defendant and so the first defendant will have to rebut the presumption of a resulting trust which arises in her favour. In other words, the plaintiff is relying on the principle enunciated by Eyre C.B. in *Dyer v. Dyer* [1788] 2 Cox 92 at p. 93:

> The trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money.

The defence is that the shares were a gift.

It is common ground that both parties profess the Muslim religion and that the sum of RM47,000 applied towards the purchase of the shares was derived from compensation monies amounting to RM105,000 paid by the Penang Adventist Hospital, George Town, in settlement of all claims arising from a suit for professional negligence brought by the plaintiff against it and that sum of RM47,000 was handed over by the plaintiff to the first defendant during the subsistence of the marriage although the action herein was commenced some three months after the divorce which is the normal period for eddah according to Professor Dr. Ahmad Ibrahim's **Islamic Law in Malaya** (1965) p. 288.

In these circumstances, Counsel for the first defendant has taken the preliminary objection that by reason of Article 121(1A) of the Federal Constitution, the Syariah Courts have exclusive jurisdiction over the issue which arise for decision in this suit and consequently this Court has no jurisdiction to do so.

To put matters in their correct perspective, it is necessary to reproduce the relevant statutory provisions.

Article 121 of the Federal Constitution was amended in June 1988 by the insertion of Clause (1A) to Article 121, and the amendment reads as follows:

> (1A) The Courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

The Administration of Muslim Law Enactment 1959, for the State of Penang, by s. 40(1) provides for the jurisdiction of the Religious Courts as follows:

> the Court of the Kathi Besar shall have jurisdiction throughout the State...
> (2) ...
> (3) The Court of the Kathi Besar shall -
>
> (a) ...
> (b) in its civil jurisdiction, hear and determine **all actions** and **proceedings** in

which all the parties profess the Muslim Religion and which relate to:

(i) betrothal, **marriage, divorce,** nullity of marriage, judicial separation or nushuz.
(ii) any disposition of, or **claim to property arising out of any of the matters set out in sub-Paragraph (1)** of this paragraph:
(iii) ...
(iv) **division *inter vivos* of *sapencerian* property.**
(v) ...
(vi) other matters in respect of which jurisdiction is conferred by any written law.

'***Sa-pencarian property***' in s. 40(1)(b)(iv) is defined under s. 2 as property acquired by a husband and wife during the continuance of the marriage.

The Enactment also gives powers to Syariah Court to make interim orders which in my views include injunctive relief. Section 75 states:

The Court may on the application of any party make interim orders **for the purpose of preserving any property in issue, or safe guarding the rights of any party, pending trial,** or facilitating the trial or hearing of the proceedings and...

On the other hand, Counsel for the plaintiff has contended that this Court **has** jurisdiction to entertain the present suit notwithstanding Article 121(1A) because the plaintiff's claim to the shares does not touch on matters relating to claims of property arising out of marriage or divorce and so the Syariah Courts have no jurisdiction to entertain this suit.

The first point which calls for consideration is what is the meaning to be ascribed to the words "all actions and proceedings in which all the parties profess the Muslim Religion and which relate to betrothal, marriage, divorce, nullity of marriage, judicial separation, or nushuz" in the context of s. 40(3)(b)(i)?

It appears to me that the intention of the Legislature in enacting s. 40(3) was to restrict the jurisdiction of the Court of the Kathi only to actions and proceedings of the sort specified thereunder.

The long title is the first of the elements of an Act of Parliament that can be used to find the meaning of the Act and particularly as "a guide to the purpose" of the Act (*Lambe v. Director-General of Social Services* [1981] 57 FLR 262, 268-269). However, unless the particular section of the Act that is under consideration is one that can have two or more different meanings, the long title must not be used to find its meaning. If, therefore, the meaning of the section is clear, it cannot be altered by reading the long title. (*Sage v. Eicholz* [1991] 2 KB 171). This does not mean that the long title may not be used to **reinforce** the meaning of the section where it is clear. Here, the long title to the Enactment provides, *inter alia*, "An Enactment to make provisions for regulating Muslim religious affairs....". Clearly, the plaintiff's claim being based on the presumption of a resulting trust, has nothing to do with Muslim religious affairs.

The next point which calls for consideration is the meaning of the words "which relate to". The **Concise Oxford Dictionary** (6th Edn) defines the word "relate" as, *inter alia*, "have reference to". It is true, as Lord Coleridge said in *R. v. Peters* [1886] 16 QBD 636, 641. "I am quite aware that dictionaries are not to be taken as authoritative exponents of the meaning of words used in Acts of Parliament, but it is a well known rule of Courts of Law that words are to be taken as used in their ordinary sense, and we are therefore sent to instruction to these books."

In my view, having regard to the context and purpose of s. 40(3)(b)(i), (ii) and (iii) as I understand it, in order to bring an action or proceeding within its purview, "marriage or divorce" or claims "to property arising out of marriage or divorce" must be directly, and not merely incidentally or remotely, involved. In other words, the marriage or divorce must have a dominant and immediate connection with the action or proceeding.

Applying this test, I fail to see how it could be said that the plaintiff's action relates to 'marriage or divorce" or "any disposition of or claim to property arising out of marriage or divorce".

As for the question whether the plaintiff's action relates to "division *inter vivos* of *sapencerian* property" within the meaning of s. 40(3)(b)(iv), it is important to note the definition of "*sepencerian* property" appearing in s. 2 of the Enactment; it provides:

property acquired by a husband and wife during the continuance of marriage

It is also helpful to refer to the following passage in the judgment of Briggs J. in *Hujah Lijah binti*

Jamal v. Fatimah binti Mat Diah [1950] MLJ 63, at p. 63 where expression "*harta sepencharian*" was considered:

> The phrase ***harta sepencharian*** I understand to mean 'acquired property', with the specialized meaning in this context of 'property acquired during the subsistence of their marriage by a husband and wife out of their joint resources or by their joint efforts'. The 'acquisition' referred to may extend to cover mere enhancement of value by reason of cultivation or development. The phrases ***harta sharikat*** and ***hartacharian laki bini*** appear to be synonymous with ***harta sepencharian*** in this context.

Applying this text, I fail to see how it could be said that the plaintiff's action relates to "division *inter vivos*, of *sepencharian* property" regard being had to the fact that it is common ground that the subject matter of this action is 47,001 units of shares which had been purchased with money provided exclusively by the plaintiff, and represented part of the compensation she had received from the Penang Adventist Hospital in settlement of her claims in the suit she had brought against it for professional negligence. There is no question, therefore, of the purchase price or any part of it, having been raised or acquired out of joint resources or joint efforts of the plaintiff and the first defendant.

For the reasons stated, the plaintiff's action does not, so far as I can see, relate to "marriage or divorce", or "any disposition of or claim to property arising out of marriage or divorce" or "division *inter vivos* of *sepencerian* property", within the meaning of s. 40(3)(b)(i), (ii) and (iv) of the Enactment of 1959. Furthermore, the claim for injunctive relief, is not, as the first defendant submits, ancillary to the divorce, but merely consequential to the primary relief sought, which is for a declaration as to ownership of the shares.

Accordingly, I would dismiss the preliminary objection as to jurisdiction based on Article 121(1A) of the Federal Constitution.

I must now consider the application to strike out the writ of summons, the indorsement and statement of claim, on the merits.

It is well settled law that where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence, no evidence is admitted (*Att. Gen Republic of Peru v. Peruvian Guano Co.* [1887] 36 Ch. D. 489, 498) and where the only ground on which the application on which the statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible (*Wenlock v. Maloney* [1965] 1 WLR 1238). However, in an application on any of the other grounds mentioned in the Rule or where the inherent jurisdiction of the Court is invoked, affidavit evidence may be and is ordinarily used. Moreover, on an application to strike out the statement of claim or to dismiss the action, it is not permissible to try the action on affidavits when the facts and issues are in dispute. (See *Wenlock v. Moloney ibid*). Also to be borne in mind is the principle that the Court will not permit a plaintiff to be driven from the judgment seat "except where the cause of action is obviously bad and almost incontestably bad." (Per Fletcher Moulton LJ in *Dyson v. AG* [1911] 1 KB 410, 419). Lastly, the Rule empowers the Court to amend any pleading or endorsement or any matter therein. This power is additional to the powers of the Court to amend under O. 20. So, its incorporation in this Rule emphasises that in suitable and proper cases the Court may exercise its coercive and curative powers at the same time.

The indorsement of claim is embodied in the writ of summons and reads as follows:

(a) An injunction restraining the 1st defendant, Md. Yusoff bin Amanshah, whether by himself or his agent or otherwise however from selling, assigning, disposing or otherwise dealing with 47,001 units of Amanah Saham in the Amanah Saham Nasional Bhd., until further order of this Court.

(b) A declaration that 47,001 units of Amanah Saham of RM1.00 each in the Amanah Saham Nasional Bhd., now standing in the name of the 1st defendant are held on trust for the plaintiff absolutely.

(c) An account of the dividends and bonuses paid to the 1st defendant by the 2nd defendant.

(d) An injunction restraining the 2nd defendant from transferring 47,001 units of Amanah Saham now standing in the name of the 1st defendant under membership No. 703011001735 to any person other than to the plaintiff, unless

otherwise ordered by this Honourable Court.

(e) An order that the 1st defendant transfers the shares to the plaintiff or as she shall direct.

(f) Costs.

(g) All such further or other relief as this Honourable Court deems just and equitable to do so.

The statement of claim, is short, and reads as follows:

1. In September 1985 the plaintiff purchased 47,001 units of Amanah Saham in the Amanah Saham Nasional Bhd., (the 2nd defendant) for the sum of RM47,001 which she paid out of her own money.
2. With the concurrence of the 1st defendant the shares were placed in the sole name of the 1st defendant.
3. The shares have belonged at all times since the purchase and belong beneficially to the plaintiff, but notwithstanding repeated requests by the plaintiff the 1st defendant has refused and refuses to transfer the shares into the name of the plaintiff or as she may direct.
4. Wherefore the plaintiff claims against the defendants for:

   (a) An injunction restraining the 1st defendant, Md. Yusoff bin Amanshah, whether by himself or his agent or otherwise howsoever from selling, assigning, disposing or otherwise dealing with 47,001 units of Amanah Saham in the Amanah Saham Nasional Bhd., until further order of this Court.

   (b) A declaration that 47,001 units of Amanah Saham of RM1.00 each in the Amanah Saham Nasional Bhd., now standing in the name of the 1st defendant are held on trust for the plaintiff absolutely.

   (c) An account of the dividends and bonuses paid to the 1st defendant by the 2nd defendant.

   (d) An injunction restraining the 2nd defendant from transferring 47,001 units of Amanah Saham now standing in the name of the 1st defendant under membership No. 1703011001735 to any person other than to the plaintiff, unless otherwise ordered by this Honourable Court.

   (e) An order that the 1st defendant transfers the shares to the plaintiff or as she shall direct.

   (f) Costs.

   (g) All such further or other relief as this Honourable Court deems just and equitable to do so.

By his affidavit (En. 9) the first defendant has set forth his version of the case, the gist of it being that the day on which the plaintiff gave him RM47,000, namely, the 2 September 1985, was his birthday, and that the plaintiff had given him this money as a special birthday present and that on the same day he had purchased the shares. Accordingly, the first defendant has contended that when the plaintiff handed over to him this money she had made an absolute gift of it to him. The plaintiff has, of course, by her affidavit in reply strongly refuted the allegation of a gift.

My attention was directed by Counsel on both sides to the authorities as to the circumstances when the Court will hold that a resulting trust has arisen in transactions involving husband and wife.

In particular, my attention was drawn to the principle found in the **Law of Trusts and Trustees** by Underhill and Hayton (14th Edn.) that although when a man purchases property in the name of his wife or intended wife, there is a *prima facie* presumption of an intention to advance the wife, the converse does not hold good. Therefore, if property is purchased in the name of the husband wholly or partly out of money belonging to the separate estate of his wife, there is a presumption of a resulting trust, capable of being rebutted by **parol** or **other evidence** showing that it was intended to be a gift." (See **Law of Trusts/Trustees** by Underhill & Hayton (14th Edn.) at p. 288) and also *Mercier v. Mercier* [1903] 2 Ch 98.

It was argued that *Mercier's* case was decided early this century when women were still economically dependent on their husbands. Then, the Courts with the use of equitable doctrines deemed it their duty to protect a woman in respect of her property.

In support, the case of *Pettit v. Pettit* [1970] AC 777 at 793, 811 and 824 was cited. In that case, three of the Law Lords took the view that the changing conditions of society had much diminished the usefulness of the presumptions of

resulting trust and advancement at least in property disputes between husband and wife. Thus the presumptions will be applied **only as a last resort and greater efforts will be made to ascertain from direct or even circumstantial evidence what the parties really intended**. This view received the approval of Lord Denning MR in *Falconer v. Falconer* [1970] 1 WLR 1333 at 1335 when he said:

> "In the notice of appeal the wife says that the Judge erred in not applying the presumption of advancement when all the relevant transaction were in the wife's name". If this case had come up for decision 20 years ago, there would undoubtedly have been a presumption of advancement: because at that time whenever a husband made financial contributions towards a house in his wife's name, there was a presumption that he was making a gift to her. That presumption found its place in the law in Victorian days where a wife was utterly subordinate to her husband. **It has no place or at any rate very little place, in our law today**: see *Pettitt v. Pettitt (ibid)*, per Lord Reid at p. 793, per Lord Hudson at p. 811 and per Lord Diplock at p. 824. We have decided these cases now for some years without much regard to a presumption of advancement, and I think we should continue so to do.

In Malaysia, the Married Women Ordinance 1957, (which also has effect in relation to Muslim women, subject to Muslim law and the customs of Malays as provided in s. 3) provides by s. 4(a) that a married woman is capable of acquiring, holding and disposing of any property in all respects as if she were a "feme sole".

On this basis, it was argued by Counsel for the first defendant that just as the plaintiff is capable of acquiring and/or holding RM105,000, she is also capable of disposing it as she pleases. And so, said Counsel, when the plaintiff gave RM47,000 to her husband (the first defendant) and the latter purchased the shares, the gift was perfected when these shares were registered in his name as appears from the relevant share certificate.

It was next contended by Counsel for the first defendant that having regard to the evidence, both direct and circumstantial, as appeared from the rival affidavits, it was clear that the plaintiff's claim was really the result of a change of mind on her part after she had been divorced by the first defendant or, in other words, that it was the result of an afterthought, and so was obviously unsustainable and an abuse of the process of the Court. Counsel then painstakingly analysed the evidence in support of this contention. But, in the view I take, I do not consider it necessary for me to solemnly wade through the evidence in an attempt to resolve the acute conflict of evidence appearing in the rival affidavits of the parties concerned or, I would add, to attempt an analysis of the authorities cited by Counsel.

Suffice it to say that in the ordinary way, in proceedings to strike out such as this, it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, especially when, as here, issues of credibility are involved. The appropriate time for assessing the evidence, having regard to the particular circumstances of this case is at the trial when there will full opportunity for cross examination and discovery. Accordingly, the prayer to strike out is refused.

It was further argued, in the alternative, by Counsel for the first defendant that, the interlocutory injunction should be set aside on the ground that there is no serious question to be tried, that there has been non-disclosure of material facts, that the plaintiff could adequately be compensated for by an award of damages and therefore, in any event, the balance of convenience favoured the first defendant rather than the plaintiff.

As to the point that there is no serious question to be tried, all I need say is that it must be self-evident from the facts of this case that there are serious questions to be tried and I need say nothing more about this point.

As to the non-disclosure point, no less than six facts had been set out in Counsel for the first defendant's written submission, which were said to have been suppressed by the plaintiff, and which it was said were material for the Court to know. These facts were as follows:

(i) The money was given to the first defendant on his birthday. Her affidavit (En. 2) was silent on this point but see paragraph 13 En. 9 and exhibit 'A' annexed thereto.

(ii) She had been giving birthday presents to the first defendant during the subsistence of their marriage. She only disclosed this after she was confronted. (see para 6 En. 11).

(iii) The divorce was by consent of both parties and that she did not complain about the

shares or claim for the same at the Kadhi's Court when both were present before the Kadhi. (see para 19 En. 9 and exhibit 'H' annexed thereto.)

(iv) Since the time of marriage every cent of the first defendant's income and rentals from his house was handed to her (see para 9 En. 9).

(v) She was bedridden for about 1 year and at all material times the first defendant took personal care of her even to the extend of her bowel and urinary and had to carry her to the bathroom (see para 13(a), 11 and 12 of En. 9).

(vi) She lied when she said that she paid her own income tax (see para 7 En. 2 but see para 10 En. 9 which was not denied by the plaintiff in her supplementary affidavit).

In exercising my discretion under this ground I have reminded myself of the current approach adopted by the Courts. The relevant principles are helpfully summarised for me by Sir Nicholas Browne-Wiliknson VC in *Dormeuil Freres SA & Anor. v. Nicolian International (Textiles) Ltd.* [1988] 3 AER 197:

> I will deal first with the application to set aside the *ex parte* order. It is a basic principle, applicable to all *ex parte* applications, that a plaintiff seeking *ex parte* relief must make full disclosure to the Court of all facts which are material to the exercise of the Court's discretion whether or not to grant the relief. If such disclosure is not made by the plaintiff, the Court may discharge the *ex parte* injunction on that ground alone. But if, in the circumstances existing when the matter comes before the Court *inter partes*, justice requires an order either continuing the *ex parte* injunction or the grant of a fresh injunction, such an order can be made notwithstanding the earlier failure of the plaintiff to make such disclosure. Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an *ex parte* order obtained without due disclosure set aside: **there is a discretion in the Court whether to do so or not.** (Emphasis supplied.)

I accept that facts (i), (ii), (iv) and (v) and to a lesser extent facts (iii) and (vi) were material for the Court to know although they are really facts which constitute part of the first defendant's case. It does not, however, necessarily follow that because the plaintiff had failed to disclose these facts that an order for discharge of the injunction must inevitably follow for the Court would still have to consider whether justice requires the injunction to continue. In considering this part of the case I have asked myself whether the non-disclosure of the facts concerned was so severe that, had there been full disclosure, this Court would not have granted the interlocutory injunction. (See *Hong Leong Holdings Ltd. v. Sunbird (Pte.) Ltd.* [1990] 3 MLJ 65; *Professor Dr. A. Kahar Bador & Ors. v. N. Krishnan & Ors.* [1983] 1 MLJ 407 at 409).

Having considered the matter in that way, I am not prepared to hold that if a full and true picture had been disclosed to the Court in the first place, I would not have granted the interlocutory injunction and so I would hold that his ground advanced by the first defendant fails.

As to the point that damages alone would be an adequate remedy for the plaintiff should she succeed in the action, I note that the shares here are the subject matter of the action and if they are disposed of before the determination of the suit, the plaintiff may well be prejudiced. It is true that the first defendant is a teacher in receipt of a salary and who, it is said, has a house, but there is no assurance that if damages were awarded in favour of the plaintiff - and who knows when that will be - he would be in a position to pay them. In this context, I have to keep in mind that the sums of money paid and to be paid by way of dividends and bonuses, accruing from the shares, would be accumulating and the total amount thereof is unknown. I was also told by Counsel for the plaintiff, without challenge by Counsel for the first defendant, that Amanah Saham shares are to be publicly listed. In such event, their value (now standing at RM1 per share) may well appreciate.

On the other hand, the sufficiency of the plaintiff's undertaking in damages has not been impugned.

This ground advanced by the first defendants for the discharge of the injunction fails.

As to the point that the balance of convenience favours the first defendant rather than the plaintiff, it was submitted by Counsel for the first defendant that the continuance of the injunction would cause further shame, inconvenience and hardship to the first defendant. I think the first defendant is being unduly sensitive and, that in any event, this is really an irrelevant argument because when considering the balance of convenience the Court is really considering the balance of justice. The fact that

the first defendant is suffering a sense of shame by reason of the injunction has nothing to do with the balance of justice. The litigation itself must be a source of embarrassment as much for the plaintiff as it is for the first defendant.

Having regard to the particular circumstances of the present case, I think that the balance of convenience favours the *status quo* being preserved, and so this ground advanced by the first defendant for the discharge of the interlocutory injunction fails.

It was lastly argued by Counsel for the first defendant that there had been unreasonable delay on the part of the plaintiff in obtaining the interlocutory injunction. It was pointed out that there was a delay of about three years before the plaintiff came to Court and made the *ex parte* application for the interlocutory injunction. Tracing the material events leading to the *ex parte* application Counsel pointed out that the money was given to the first defendant on 2 September 1985. The shares were converted into shares certificates under the name of the first defendant on 25 July 1986. The parties were divorced on 6 April 1988 and only three months after the divorce i.e. on 14 July 1988, the writ was filed in Court. In her supplementary affidavit, the plaintiff tried to make a feeble attempt to explain the delay by saying that she was most of the time sick and yet in her affidavit in support of the injunction order she said that she was operating her own petrol service station. It is obvious that the claim was made as an afterthought in order to punish and to make the first defendant's life miserable knowing fully well that he had suffered enough during the subsistence of the marriage.

It is settled law that delay on the part of the plaintiff in seeking an interlocutory injunction 'may be calculated to throw considerable doubt upon the reality of his alleged injury' (per Lord Chelmsford LC in *Ware v. Regent's Canal Co.* at p. 1257) and hence may be of importance when the balance of convenience is being determined. But much will depend upon the particular circumstances of each case. In other words, the delay is often explicable by reference to other circumstances; for example, a plaintiff might have delayed the institution of proceedings because he wished to obtain better means of proving his case (see *Coles v. Sims* at p. 771). It follows, therefore, that delay on the part of a plaintiff, although it may give rise to an inference that he has not suffered hardship or prejudice, such inference is easily open to rebuttal by direct evidence of the particular circumstances.

In my opinion, having regard to the relationship of the parties concerned, and their particular circumstances, it is but natural that the plaintiff would have been reluctant to have sued the first defendant. I do not therefore consider that the delay in the present case was to serious as to result in the discharge of the interlocutory injunction.

This ground advanced by Counsel for the first defendant also fails.

Finally, I had paid especial regard to the interests of both parties, keeping in mind their foreseeable positions, considerations of hardship, the balance of convenience and all other relevant discretionary factors.

In the result, I would dismiss the application with costs. It follows, that the interlocutory injunction must continue until the final determination of the suit or until further order, subject to the usual undertaking as to damages by the plaintiff. The first defendant must file his defence within one month from date hereof. I also direct an early trial.